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ASM Metal Sdn Bhd v Malayan Banking Bhd (by vesting order dated 22 December 2000, assets and liabilities owned by The Pacific Bank Bhd taken over by Malayan Banking Bhd with effect on and from 1 January 2001)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–857 OF 2009
HASAN LAH, HELILIAH AND MOHD HISHAMUDIN JJCA
C 27 AUGUST 2010

Land Law — Sale of land — Order for — Appeal against order — 'Cause to the contrary — Whether 'cause to the contrary' established — Whether respondent could amalgamate revolving credit facility and overdraft facility to claim under charge —
D *Whether Form 16D issued by respondent to appellant invalid and ineffective because it had combined sums owing under two facilities — National Land Code ss 254 & 256*

At the request of the appellant and Kai Peng Bhd ('the borrower'), The Pacific
E Bank Bhd ('PBB') granted the borrower a revolving credit facility. This revolving credit facility was secured a third party charge over the property created by the appellant in favour of PBB. By virtue of a vesting order, all assets and liabilities including the revolving credit facility and the charge became vested in the respondent. In addition to the revolving credit facility, the
F borrower had executed a corporate guarantee in favour of the respondent to secure repayment of an overdraft facility granted by the respondent to Kai Peng Vessels Sdn Bhd, a company wholly owned by the borrower. Subsequently, the borrower defaulted in the repayment of the amount due and owing both under the revolving credit facility and the overdraft facility that was secured by a
G corporate guarantee. The respondent demanded from the appellant payment of the amount due and owing under the revolving credit facility and the overdraft facility ('the two facilities'). When the appellant failed, neglected and/or refused to pay the sum demanded, the respondent served a notice in Form 16D pursuant to s 254 of the National Land Code ('NLC') requiring the
H appellant to remedy the default under the charge within seven days from the date of the notice. As the appellant failed to remedy the default, the respondent applied for an order for sale of the charged property. The appellant resisted this application solely on the ground that the respondent was only entitled to claim under the charge the amount due by the borrower under the revolving credit
I facility and that the indebtedness of the borrower under the overdraft facility should not be claimed pursuant to the charge. The trial judge held that under the terms of the charge, and in particular cl 7 of the annexure to the charge, the charge was intended to be a continuing security for all moneys owing to the respondent by the borrower. Hence the trial judge granted the order for sale of

the property to satisfy the two facilities. This was the appellant's appeal against that decision. The appellant submitted that the Form 16D was defective and invalid because it had combined the amounts due under the two facilities and that there was therefore in existence a 'cause to the contrary' under s 256(3) of the NLC. In response the respondent submitted that under the terms of the charge, especially cll 7, 36 and 62 of the annexure to the charge, it had the right to claim from the appellant the amount due and owing by the borrower under the two facilities. The main issue to be determined in this appeal was whether the respondent could amalgamate the two facilities and make the appellant liable to the respondent under the terms of the charge for the indebtedness arising from the overdraft facility secured by the corporate guarantee.

Held, allowing the appeal with costs:

(1) (per **Hasan Lah JCA**) In the instant case the two loan facilities were made by two banks. The charge was to secure the loan given by PBB to the borrower, whilst the corporate guarantee was given to the respondent for the overdraft facility. There was nothing in the vesting order that provided that the respondent may amalgamate their rights and the rights of PBB and as such, cl 7 of the annexure to the charge had to be viewed in that context. Although cl 7 was wide enough to secure the revolving credit facility granted by PBB to the borrower, it was not the intention of the parties that the charge would cover the indebtedness of the borrower under the corporate guarantee. In the circumstances the Form 16D issued by the respondent to the appellant was invalid and ineffective because the respondent had combined the sums owing under the revolving credit facility and the corporate guarantee, which exceeded the actual sum owed and payable by the borrower under the revolving credit facility (see paras 22–23).

(2) (per **Hasan Lah JCA**) In the circumstances of the whole case the appellant had shown 'cause to the contrary' within s 256(3) of the NLC to oppose the respondent's application for an order of sale of the property (see para 25).

(3) (per **Heliliah JCA, dissenting**) By virtue of the vesting order, the rights of PBB had been effectively transferred to the respondent and this had effectively resulted in an amalgamation of the rights of the respondent accrued from the charge created as well as the corporate guarantee. There was in effect a continuing security covering all monies at the time of the creation of the charge. Thus, when the respondent in the instant case applied for an order for sale of the property charged, the appellant as chargor had to bring his case within any one of the categories of cases in which 'cause to the contrary' might be established. However, the appellant, failed to raise a 'cause to the contrary'. The terms of the charge and the provisions of BAFIA clearly conferred on the respondent a right

A to institute a mechanism pursuant to O 83 to claim both under the credit facility and the corporate guarantee. Thus the trial judge had not erred in allowing both claims to be made under an order for sale of land made pursuant to s 256 of the NLC, and the instant appeal ought to be dismissed (see paras 39, 41 & 44–45).

B

[Bahasa Malaysia summary

Atas permintaan perayu dan Kai Peng Bhd ('peminjam'), Pacific Bank Bhd ('PBB') telah memberikan peminjam kemudahan pinjaman pusingan. Kemudahan pinjaman pusingan ini telah dijamin oleh gadaian pihak ketiga ke
C atas harta yang dibentuk oleh perayu bagi pihak PBB. Melalui perintah letakhak, kesemua aset-aset dan liabiliti-liabiliti termasuk kemudahan pinjaman pusingan dan gadaian tersebut diberikan kepada responden. Sebagai tambahan kepada kemudahan pinjaman pusingan tersebut, peminjam telah menandatangani jaminan korporat bagi pihak responden untuk menjamin
D pembayaran kemudahan overdraf yang diberikan oleh responden kepada Kai Peng Vessels Sdn Bhd, sebuah syarikat milik penuh peminjam. Kemudiannya, peminjam telah ingkar membuat bayaran amaun yang perlu dibayar dan terhutang di bawah kedua-dua kemudahan pinjaman pusingan dan overdraf ('kedua-dua kemudahan'). Apabila perayu telah gagal, cuai dan/atau ingkar
E untuk membayar jumlah yang dituntut, responden telah menyampaikan notis di dalam Borang 16D menurut s 254 Kanun Tanah Negara ('KTN') yang memerlukan perayu untuk meremedikan keingkaran di bawah gadaian dalam masa tujuh hari dari tarikh notis tersebut. Memandangkan perayu telah gagal untuk meremedikan keingkaran tersebut, responden telah memohon perintah
F jualan bagi harta yang telah digadaikan. Perayu menentang permohonan ini semata-mata atas alasan bahawa responden hanya berhak menuntut di bawah gadaian amaun yang perlu dibayar oleh peminjam di bawah kemudahan pinjaman pusingan dan bahawa keberhutangan peminjam di bawah kemudahan overdraf tidak patut dituntut menurut gadaian tersebut. Hakim
G bicara memutuskan bahawa di bawah terma gadaian tersebut, dan terutamanya klausa 7 lampiran kepada gadaian tersebut, gadaian tersebut dimaksudkan sebagai jaminan berterusan untuk semua wang yang terhutang kepada responden oleh peminjam. Justeru, hakim bicara telah memberikan perintah jualan harta tersebut untuk memenuhi kedua-dua kemudahan
H tersebut. Ini meruapakan rayuan perayu terhadap keputusan tersebut. Perayu berhujah bahawa Borang 16D adalah cacat dan tidak sah kerana ia telah menggabungkan amaun-amaun yang perlu dibayar di bawah kedua-dua kemudahan dan oleh itu, wujudnya 'cause to the contrary' di bawah s 256(3) KTN. Sebagai balasan, responden berhujah bahawa di bawah terma gadaian
I tersebut, terutamanya klausa-klausa 7, 36 dan 62 lampiran kepada gadaian, ia berhak membuat tuntutan amaun yang perlu dibayar dan terhutang oleh peminjam daripada perayu di bawah kedua-dua kemudahan tersebut. Isu utama yang perlu dipertimbangkan dalam rayuan ini adalah sama ada responden boleh menggabungkan kedua-dua kemudahan dan menjadikan

perayu bertanggungan kepada responden di bawah terma-terma gadaian untuk keberhutangan yang wujud daripada kemudahan overdraf yang dijamin oleh jaminan korporat.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Hasan Lah HMR**) Dalam kes ini, kedua-dua kemudahan pinjaman telah dibuat oleh dua bank. Gadaian tersebut adalah untuk menjamin pinjaman yang diberikan oleh PBB kepada peminjam, manakala jaminan korporat telah diberikan kepada responden untuk kemudahan overdraf tersebut. Tiada apa-apa di dalam perintah letakhak yang memperuntukkan bahawa responden boleh menggabungkan hak-hak mereka dan PBB dan oleh itu, klausa 7 lampiran kepada gadaian hendaklah dilihat daripada konteks tersebut. Meskipun klausa 7 adalah cukup luas untuk menjamin kemudahan pinjaman pusingan yang diberikan oleh PBB kepada peminjam, ianya bukan niat pihak-pihak bahawa gadaian tersebut akan melindungi keberhutangan peminjam di bawah jaminan korporat tersebut. Dalam keadaan ini, Borang 16D yang dikeluarkan oleh responden kepada perayu adalah tidak sah dan tidak efektif kerana responden telah menggabungkan jumlah-jumlah yang terhutang di bawah kemudahan pinjaman pusingan dan jaminan korporat, yang mana berlebihan daripada jumlah sebenar yang terhutang dan perlu dibayar oleh peminjam di bawah kemudahan pinjaman pusingan tersebut (lihat perenggan 22–23).

(2) (oleh **Hasan Lah HMR**) Dalam keadaan keseluruhan kes ini, perayu telah menunjukkan 'cause to the contrary' dalam rangkuman s 256(3) KTN untuk membantah permohonan responden untuk perintah jualan harta tersebut (lihat perenggan 25).

(3) (oleh **Heliliah HMR, menentang**) Berikutan perintah letakhak tersebut, hak-hak PBB telah dipindahkan kepada responden dengan efektif dan ianya dengan efektif telah membawa kepada penggabungan hak-hak responden yang terakru daripada gadaian yang dibuat dan juga jaminan korporat tersebut. Terdapat jaminan berterusan yang melindungi kesemua wang pada masa pembentukan gadaian tersebut. Justeru, apabila responden dalam kes ini memohon untuk perintah jualan harta yang digadai, perayu sebagai penggadai hendaklah membawa kesnya di dalam salah satu kategori kes di mana 'cause to the contrary' dapat dibuktikan. Walau bagaimanapun, perayu, telah gagal menimbulkan 'cause to the contrary'. Terma-terma gadaian dan peruntukan-peruntukan BAFIA dengan jelas memberi responden hak untuk memulakan mekanisma mengikut A 83 untuk menuntut di bawah kedua-dua kemudahan pinjaman dan jaminan korporat. Oleh itu, hakim bicara tidak khilaf dalam membenarkan kedua-dua tuntutan untuk

dilakukan di bawah perintah jualan yang dibuat mengikut s 256 KTN dan rayuan ini seharusnya ditolak (lihat 39, 41 & 44–45).]

Notes

For cases on order for sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4737–4854.

Cases referred to

Bunbury Foods Pty Ltd v National Bank of Australasia Ltd (1984) 153 CLR 491, HC (refd)

Cambridge Credit Corpn v Lombard Australia Ltd (1977) 136 CLR 608 (distd)

Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283, HC (refd)

James Pledge v White and others [1896] AC 187, HL (distd)

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119, SC (refd)

Kawood Sdn Bhd v HSBC Bank Malaysia Bhd & Ors [2001] MLJU 650; [2001] 8 CLJ 363, HC (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 2 CLJ 36, FC (refd)

Malayan United Finance Bhd v Tay Lay Soon [1991] 1 MLJ 504, SC (refd)

Phileoallied Bank (M) Bhd v Koshish Credit & Leasing Sdn Bhd [2002] 1 MLJ 245; [2001] 4 CLJ 788, HC (refd)

Tararone Investments Pte Ltd, Re; Development Bank of Singapore Ltd v Ong Yew Huat & Ors (judicial managers of Tararone Investments Pte Ltd, jointly and severally) [2001] 4 SLR 167, CA (distd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 50, 50(j)

National Land Code ss 254, 256, 256(3), 340, Form 16D

Rules of the High Court 1980 O 83

Appeal from: Originating Summons No S5–24–2288 of 2007 (High Court, Kuala Lumpur)

Kamaruzaman Arif (Kamaruzaman Arif, Amran & Chong) for the appellant.

Sean Yeow (Mong Chung Seng and Wong Weng Yew with him) (Lee Hishammuddin, Allen & Gledhill) for the respondent.

Hasan Lah JCA (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the High Court given on 24 April 2009, allowing the respondent's application for an order for sale of the land held under HS (D) 72973, PT 3891, District of Petaling, Kuala Lumpur ('the property') pursuant to s 256 of the National Land Code.

[2] On 13 October 2009 Mohd Hishamudin Yunus JCA and I had, by a majority, allowed the appeal at the conclusion of the submissions of counsel for the appellant and the respondent (Heliliah Mohd Yusof JCA dissenting). A

[3] We now give the grounds of the majority decision. B

[4] The facts relevant to the appeal are as follows. At the request of the appellant and Kai Peng Bhd ('the borrrower') the Pacific Bank Bhd ('PBB') granted a revolving credit facility to the borrower. Repayment of the revolving credit facility was secured by, inter alia, a third party charge ('the charge') dated 9 December 1999 over the property created by the appellant in favour of PBB. C

[5] Under a vesting order dated 22 December 2000 made under s 50 of the Banking and Financial Institutions Act 1989, all assets and liabilities of PBB, including the revolving credit facility and the charge, were vested in the respondent with effect from 1 January 2001. D

[6] Earlier, the borrower had executed a corporate guarantee dated 9 August 1994 ('the corporate guarantee') in favour of the respondent to secure repayment of an overdraft facility granted by the respondent to Kai Peng Vessels Sdn Bhd. E

[7] The borrower defaulted in the repayment of the amount due and owing under the revolving credit facility and the corporate guarantee. As at 31 May 2007 the amount due and owing by the borrower to the respondent was in the sum of RM831,567.16 consisting of RM289,836.42 for the revolving credit facility and RM541,730.74 for the corporate guarantee. By its solicitors' letter dated 7 June 2007, the respondent demanded from the appellant payment of the amount due and owing by the borrower under the revolving credit facility and the corporate guarantee. The appellant had failed, neglected and/or refused to pay the sum demanded. F G

[8] The respondent, pursuant to s 254 of the National Land Code and through its solicitors, served a notice in Form 16D dated 23 August 2007 on the appellant, requiring the appellant to remedy the default under the charge within seven days from the date of the notice. The appellant failed, neglected and/or refused to remedy the default. H

[9] On 2 October 2007 the respondent took out an originating summons to seek an order for sale of the property, which was granted by the High Court. I

[10] In the High Court, the appellant resisted the respondent's originating summons solely on one ground, that is, the respondent is only entitled to claim

under the charge the amount due by the borrower under the revolving credit facility. It was the contention of the appellant that at the time the charge was created, it was never the intention of the appellant to be held responsible for the indebtedness of the borrower under the corporate guarantee. The appellant further submitted that the respondent had breached its statutory or contractual obligation when it failed to accede to the appellant's request to redeem the charge by payment of the sum due under the revolving credit facility only.

[11] In the written grounds of judgment of the learned judicial commissioner she allowed the respondent's originating summons on, inter alia, the following grounds:

(a) Clause 7 of the annexure to the charge provides that the charge is intended to be a continuing security for all moneys owing to the respondent by the borrower and/or the appellant as principal or surety.

(b) The appellant, after having agreed to the terms of the charge, is precluded from contending that the charge was only intended to secure the borrower's indebtedness under a revolving credit facility, and not a borrower's indebtedness under the corporate guarantee.

[12] Before us, learned counsel for the appellant submitted on one main issue, that is, whether the respondent may amalgamate both the revolving credit facility and the overdraft facility and make the appellant liable to the respondent under the terms of the charge for the indebtedness of the borrower under the corporate guarantee. The appellant took the position that it is only liable under the terms of the charge in relation to the revolving credit facility and not in relation to the overdraft facility. It is the appellant's contention that Form 16D dated 23 August 2007 issued by the respondent is defective because the respondent had combined the amounts due under the two facilities. As a result of the defective and invalid notice, there was therefore in existence a cause to the contrary under s 256(3) of the National Land Code. In support of his contention learned counsel for the appellant cited the case of *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283.

[13] With regard to the terms of the charge learned counsel for the appellant submitted that the liability of the appellant under cl 1 of the annexure to the charge is restricted to facility granted to the borrower by PBB. As such the appellant cannot be made liable for the amount owed by the borrower under the overdraft facility.

[14] It was further submitted that the liability under cl 7 of the annexure to the charge must be given a similar restriction. The security created by the charge must also be restricted to the facility granted by PBB.

[15] In response, learned counsel for the respondent submitted that the terms of the charge, especially cll 7, 36 and 62 of the annexure to the charge, clearly provide for the respondent's right to claim from the appellant, the amount due and owing by the borrower under the two facilities. The rights of PBB under the terms of the charge were vested in the respondent by the vesting order where it provides, inter alia, that:

> Where any right or liability of Pacific Bank is transferred to Maybank, Maybank shall have the same rights, powers and remedies … as if it had at all times been a right or liability of Maybank …

[16] Learned counsel for the respondent further submitted that pursuant to cl 7 of the annexure to the charge the respondent was entitled to claim from the appellant not only the amount due under the revolving credit facility but also the amount due under the corporate guarantee. In support of his submission learned counsel cited the following cases:

(a) *Cambridge Credit Corpn v Lombard Australia Ltd* (1977) 136 CLR 608;

(b) *Kawood Sdn Bhd v HSBC Bank Malaysia Bhd & Ors* [2001] MLJU 650; [2001] 8 CLJ 363;

(c) *Re Tararone Investments Pte Ltd; Development Bank of Singapore Ltd v Ong Yew Huat & Ors (judicial managers of Tararone Investments Pte Ltd, jointly and severally)* [2001] 4 SLR 167; and

(d) *James Pledge v White and others* [1896] AC 187.

[17] It is also the contention of learned counsel for the respondent that since the charge was intended to be a continuing security, the respondent was entitled to claim from the appellant, the borrower's debt under the corporate guarantee.

[18] Clause 7 of the annexure to the charge provides:

> 7. The security hereby created is expressly intended to and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the Bank by the Chargor(s) and/or the Borrower(s) whether alone or jointly and severally with another or others and whether as principal or surety notwithstanding that the Chargor(s) and/or the Borrower(s) may at any time or times cease to be indebted to the Bank to any period or periods and notwithstanding that the account or accounts of the Borrower(s) with the Bank may from any cause whatsoever cease to be a current account or accounts and notwithstanding any settlement of account or accounts or otherwise.

[19] In *Cambridge Credit Corpn* a registered bill of mortgage over certain land in Queensland secured repayment of moneys lent by the mortgagee to the

mortgagor. At the time the mortgage was given the mortgagor had a contingent liability as guarantor to the mortgagee of loans that the mortgagee had made to companies associated with the mortgagor. The mortgagor became liable under the guarantee during the subsistence of the mortgage. The bill of mortgage charged the lands with the principal advanced by the mortgagee and interest thereon and 'all such further and other sums of money … as are now or hereafter shall become due or payable owing … upon any account whatsoever …'

The High Court of Australia held, inter alia, that the charging words of the mortgage extended to liabilities which were contingent at the date of its execution and ceased to be contingent during its subsistence. Hence the amount due under the guarantee was charged as a sum which had become due, owing or payable.

[20] In *Re Tararone Investments Pte Ltd* Sogo Department Stores (S) Pte Ltd, an associate company of Tararone, was indebted to DBS to the tune of $18m in an overdraft account in March 1998. DBS informed Sogo that they would be willing to continue granting Sogo overdraft facility of up to $18m, subject to Sogo progressively reducing the overdraft outstanding in according with a repayment schedule, and a security, in the form of a charge in respect of a $18m fixed deposit to be placed by Tararone with DBS.

Under cl 1 of the charge, the charge was expressly stated to be in respect of 'advances, loans, credit and/or other banking facilities or accommodation' given to Sogo, all of which facilities were collectively referred to as 'the banking facilities'. Under this clause, Tararone covenanted to pay to DBS, on demand all sums of money owing by Sogo in respect of those banking facilities. Clause 6 further reaffirmed that notwithstanding the other provisions, the charge 'shall be and remain a continuing security for all moneys and liabilities from time to time owing by Sogo to DBS in respect of the banking facilities'.

The High Court of Singapore ruled that the charge was only to secure the $18m overdraft debt which Sogo owed to DBS at the time the charge was created and that the phrase 'all moneys and liabilities which may be owing to the Bank from time to time' appearing in the facility letter related to ancillary debts such as interests and costs arising under the facility. The High Court was of the view that while the wording of the charge seemed to be wide, the clauses therein must be read together to determine the parties' intention.

On appeal, the Court of Appeal of Singapore held that this charge is a charge in respect of all moneys from any account which are owed by Sogo to DBS. While the original reason for the creation of the charge was the $18m overdraft facility which DBS had then granted to Sogo, and which DBS were prepared to continue to extend to Sogo, the express terms of the charge clearly go beyond that. Nowhere is it stated, nor can it be implied, that the charge merely secures the payment of the overdraft facility.

[21] In *James Pledge* the House of Lords held that where the owner of different properties mortgages them to different persons and the mortgages afterwards become united in title, the holder of the mortgages has a right to consolidate them, and to refuse to be redeemed as to one without payment of what is due to him on all, not only as against the mortgagor but also as against a person to whom the mortgagor has by one deed assigned the equity of redemption of all the properties, although the assignment is made before the mortgages become united in title.

[22] In our view the cases mentioned above can be distinguished on the ground that the loans were made by one bank only. There is nothing in the vesting order to say that the respondent may amalgamate their rights and the rights of PBB. In the instant case the charge was to secure the loan given by PBB to the borrower. As such we are of the view that cl 7 of the annexure to the charge must be viewed in that context. Even though the wording of cl 7 seems to be wide the charge in our view was only to secure the revolving credit facility granted by PBB to the borrower. It was not the intention of the parties that the charge would cover the indebtedness of the borrower under the corporate guarantee given by the borrower in favour of the respondent in respect of the overdraft facility granted by the respondent five years earlier to Kai Peng Vessels Sdn Bhd.

[23] We agree with the submission of learned counsel for the appellant that the Form 16D dated 23 August 2007 issued by the respondent to the appellant is invalid and ineffective because the respondent had combined the sums owing under the revolving credit facility and the overdraft facility. The sum mentioned in the statutory notice in Form 16D therefore exceeded the actual sum owed and payable by the borrower under the revolving credit facility. In *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283 Lim Beng Choon J made the following observation at p 288:

> Under the circumstances I am impelled to hold that the wrongful demand for payment of the default interest to which the plaintiff bank is not entitled must necessarily render the notice of demand and the Form 16D ineffectual and invalid. It is not a simple case of the said notices of demand containing an erroneous sum but it is a case where the said notices were demanding payment of something to which the plaintiff bank had no right.

[24] In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36 the Supreme Court held that cause to the contrary within s 256(3) of the National Land Code may be established only in three categories of cases, namely:

(a) a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the Code;

(b) a chargor who is able to show that the chargee has failed to meet the conditions precedent for making of an application for order for sale; and

(c) a chargor who is able to demonstrate that its grant would be contrary to some rule of law or equity.

With regard to the second category the Supreme Court, through Gopal Sri Ram JCA, said at pp 45–46:

> Secondly, a chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.

[25] In the circumstances of the whole case and for the above reasons we came to the conclusion that the appellant had shown cause to the contrary within s 256(3) of the National Land Code to oppose the respondent's application for an order for sale of the property. We therefore allowed the appeal with costs and the orders made by the High Court were set aside.

Heliliah JCA:

[26] The facts leading to this appeal have been amply stated in the grounds of judgment of my learned brother Hasan Lah JCA.

[27] The entire appeal rests on the interpretation of certain clauses which would establish the liability of the appellant. The revolving credit facility granted to Kai Peng Bhd ('the borrower') was secured by a third party charge. The fact is undisputed that the revolving credit facility was granted at the request of both the appellant and the borrower and the charge dated 9 December 1999 was created in favour of the Pacific Bank Bhd ('PBB').

[28] As noted in the majority judgment by virtue of a vesting order dated 22 December, pursuant to s 50 of the Banking and Financial Institutions Act 1989 ('BAFIA'), all assets and liabilities of the PBB including the revolving credit facility and the charge became vested in the respondent.

[29] Cited before the learned judicial commissioner are various provisions in the third party charge created on 9 December 1999 by the appellant in favour of PBB. The provisions are as follows:

7. The security hereby created is expressly intended to and shall be a *continuing security for all moneys whatsoever now or hereafter from time to time owing to the Bank by the Chargor(s) and/or the Borrower(s) whether alone or jointly and severally with another or others and whether as principal or surety notwithstanding* that the Chargor(s) and/or the Borrower(s) may at any time or times cease to be indebted to the Bank for any period or periods and notwithstanding that the account or accounts of the Borrower(s) with the Bank may from any cause whatsoever cease to be a current account or accounts and notwithstanding any settlement of account or accounts or otherwise.

36. The security liabilities and obligations created by this Charge shall continue to be valid and binding for *all purposes whatsoever notwithstanding any change by amalgamation reconstruction or otherwise which may be made in the constitution of the Bank or of any company by which the business of the Bank may for the time being be carried on* and shall be available to the company carrying on that business for the time being.

67. Notwithstanding any provision hereof, it is hereby expressly agreed that upon default or breach by the Chargor(s) and/or the Borrower(s) of any term, covenant, stipulation and/or undertaking herein provided and on the part of the Chargor(s) and/or the Borrower(s) to be observed and performed, the *Bank shall hereafter have the right to exercise all or any of the remedies available whether by this Charge or by statute or otherwise and shall be entitled to exercise such remedies concurrently including pursuing all remedies* of sale or possession pursuant to the National Land Code and civil suit to recover all monies due and owing to the Bank.

68. The Bank is entitled to proceed with legal proceedings against the Chargor(s) and/or the Borrower(s) or to recall or not to make available or disburse the said facility *if there is a default in the payment of any monies due by the Chargor(s) and/or the Borrower(s) hereunder or under other agreement or security documents evidencing the Chargor(s) and/or the Borrower(s) indebtedness to the Bank and/or to any other financial institutions or under the associated* accounts of the Chargor(s) and/or the Borrower(s) with the Bank or the accounts of any other party of which the Chargor(s) and/or the Borrower(s) is a guarantor or where the Chargor(s) and/or the Borrower(s) or the subsidiary of the Chargor(s) and/or the Borrower(s) ceases or threatened to cease to carry on the business or a petition be presented for the bankruptcy or winding up of the Chargor(s) and/or the Borrower(s) or the subsidiary of the Chargor(s) and/or the Borrower(s) or where the sole proprietor or any one of the partners or directors or guarantors as the case may be of the associated accounts has been adjudged bankrupt or becomes insane or dies.

[30] The following clause is also to be considered:

1. In consideration of the Bank agreeing at the request of the Chargor(s) and KAI PENG BERHAD (Co. Regn. No. 32395–P) a company duly incorporated in Malaysia under the Companies Act 1965 and having a place of registered office at Suite 8.03, 8th Floor, Menara Promet, Jalan Sultan Ismail, 50250 Kuala Lumpur.

(hereinafter referred to as 'the Borrower(s)') to grant granting and/or continuing to grant to the Borrower(s) the said facility (hereinafter defined) the *Chargor(s) will on demand pay to the Bank all sums of moneys which are now or shall from time to time or at any time hereafter be due and owing by the Borrower(s) and/or the Chargor(s)* solely or jointly with any other persons firms or companies and whether as principal or surety or which the Borrower(s) may be or become liable to the Bank anywhere on banking account or accounts current or otherwise or in any manner whatsoever including the balance for the time being owing for or in respect of cheques bills notes drafts or other negotiable instruments accepted paid or discounted for and on behalf of the Borrower(s) either alone or jointly with another or others or for any other payments loans credit or advances made to or for the use or accommodation or on behalf of the Borrower(s) whether alone or jointly with another or others pursuant to or in respect of or under any guarantee or indemnity or letter of credit given established or opened by the Bank for the Borrower(s) or any contracts for the forward delivery of goods bills or specie or in respect of any other banking facilities whatsoever whether or not given upon or under any trust receipts or other security whatsoever or otherwise howsoever up to an aggregate sum of Ringgit Malaysia.

[31] The same borrower executed a corporate guarantee dated 9 August 1994 in favour of the respondent to secure repayment of an overdraft facility granted by the respondent to Kai Peng Vessels Sdn Bhd that is a company wholly owned by the borrower. Subsequently, the borrower defaulted in the repayment of the amount due and owing both under the revolving credit facility and the corporate guarantee. A demand was made by the respondent to the appellant by its solicitor's letter dated 7 June 2007 for the payment of the amounts due and owing by the borrower under the revolving credit facility and the corporate guarantee.

[32] The issue before this court is whether the respondent is entitled to claim from the appellant under the terms of the charge the amount due and owing by the borrower under the revolving credit facility as well as the corporate guarantee. The respondent relies on a vesting order dated 22 December 2000 that has been made under s 50 of the BAFIA. The relevant parts of s 50 are the following:

> 50 Application to High Court to facilitate agreement or arrangement for transfer of whole or part of business of licensed institution being given effect to
>
> (1) Where the Minister has granted his approval under section 49(7) to an application in respect of an agreement or arrangement under section 49(1) (b) or (c), the licensed institution whose business is to be transferred (hereinafter referred to as the 'transferor') and the licensed institution or other person to whom the transfer is to be made (hereinafter referred to as 'the transferee') may make a joint application to the High Court by way of an ex parte originating summons for such order of the Court as may be required by them to facilitate or enable the agreement or arrangement being given effect to, and in such

application there may be sought all or any of the following orders:

(a)–(c)

(d) for any existing agreement to which the transferor was a party to have effect as if the transferee had been a party thereto instead of the transferor;

(e)–(i)

(j) where any right or liability of the transferor is transferred to the transferee, —for the transferee to have the same rights, powers and remedies (and in particular the same rights and powers as to taking or resisting legal proceedings or making or resisting applications to any authority) for ascertaining, protecting or enforcing that right or resisting that liability as if it had at all times been a right or liability of the transferee, including those rights or liabilities in respect of any legal proceedings or applications to any authority pending immediately before the transfer date by or against the transferor;

(k)–(l)

(2) ...

(3) Where the order of the High Court under subsection (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

[33] The vesting order relied upon by the respondent was the consequence of a joint application made by PBB and the respondent whereby the entire banking business of PBB including assets and liabilities is to be transferred to the respondent pursuant to a sale agreement between the two. The details of the assets and liabilities have also being listed in the vesting order granted by the court pursuant to the order that was made dated 22 December 2000. Thus, while Maybank may have been the entity that is entitled to claim under the corporate guarantee from the same borrower, by virtue of the vesting order whatever rights and liabilities that were previously held by PBB thereby became vested in the respondent. The nexus that provides for the rights of PBB under the terms of the charge to the respondent is therefore found by virtue of para 2(m) of the vesting order. That paragraph specifically states as follows:

(m) sebarang hal atau liabiliti Pacific Bank yang dipindah kepada Maybank, Maybank mempunyai hak, kuasa dan remedi yang sama (dan khususnya hak dan kuasa yang sama tentang pengambilan atau penolakan sebarang prosiding

undang-undang atau pembuatan atau penolakan permohonan kepada mana-mana pihak berkuasa) bagi memastikan, melindungi atau menguatkuasakan hak tersebut atau menentang liabiliti tersebut seolah-olah ianya telah pada setiap masa menjadi hak atau liabiliti Maybank, termasuk hak atau liabiliti yang berkenaan dengan apa-apa prosiding undang-undang atau permohonan kepada mana-mana pihak berkuasa yang belum selesai, sebelum sahaja Tarikh Pemindahan tersebut, oleh atau terhadap Pacific Bank;

[34] The provision of para (m) is effectively enforced by a statutory provision found in s 50(j) as referred to above. The above provisions indicate that any right or liability of PBB previously enjoyed is effectively transferred to the respondent who then would enjoy the same rights, powers and remedies *as if it had at all times being a right or liability of Maybank*.

[35] At this juncture it is also useful to mention the relevant clauses of the corporate guarantee undertaken by the borrower namely:

1. We will pay you on demand:-

   (i) all moneys which now are or may during the operation of this Guarantee be owing to you from the Customer or remain unpaid on the general balance of the Customer's account with you anywhere and on any account whatsoever whether from the Customer alone or from the Customer jointly with or as surety for any other person or persons or for any firm or company including advances overdrafts discounts bills or notes held by you on or in respect of which the Customer may be or have been liable to you in any manner together with commission and other ordinary banking expenses including interest at such rate as may be from time to time be agreed between the Customer and you with monthly rests although the relation of banker and customer may have ceased;

   (ii) all amounts which now are or may during the operation of this Guarantee become owing to you by the Customer in respect of indemnities and/or guarantees given to the owners agents charterers or masters of ships or in respect of any other kinds of indemnities and/or guarantees whatsoever entered into by you at the request of or on behalf of the Customer or in respect of any bills accepted by the Customer;

   (iii) all amounts which now are or may during the operation of this Guarantee become owing to you by he Customer arising out of any agreement in writing made with you or otherwise howsoever in respect of Bankers Acceptances or Letters of Credit or any Letter of Credit irrevocable or otherwise opened or established through you upon the application of the Customer and either with you or any agent or branch of yours wherever situated; and

   (iv) all costs charges and expenses which you may incur in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the money or amounts hereby guaranteed.

...

7. You are to be at liberty but not bound to resort for your own benefit to any other means of payment at any time and in any order as you think fit without in consequence diminishing our liability to you hereunder and you may enforce this Guarantee for the payment of the ultimate balance after resorting to other means of payment or for the balance due at any time notwithstanding that other means of payment have not been resorted to and in the latter case, without entitling us to any benefit from such other means of payment so long as any money remains due or payable (whether actually or contingently) from the Customer to you.

[36] This appeal in effect pertains to a matter of both statutory interpretation and the interpretation to be given to the provisions available under the charge. By virtue of the vesting order, there stands a common entity that is an amount due and owing by the same borrower under the revolving credit facility (originally owed to PBB) and corporate guarantee executed by the same borrower in favour of the respondent. The respondent now stands in the shoes of PBB with all the rights and liabilities hitherto enjoyed by PBB.

[37] This court is being requested to give effect to the terms of the vesting order. The appellant in this case is not disputing the existence of the borrower's debt but disputes the mode as well as the procedure for recovering the claim from the appellant in respect of the borrower's debt under the corporate guarantee. It's therefore incumbent to rely upon the terms of the charge whereby the security is expressly stated to be a continuing security for all monies whatsoever 'now or hereafter … owing to the Bank by the chargor and or borrower whether a loan or jointly or severally … and whether as principal or surety'. The interpretation to be given to such a clause in ordinary business sense is that the appellant in this appeal in effect has undertaken to provide a continuing security for the monies owing to the bank. In this case the respondent for cl 7 of the annexure of the charge clearly stipulates that the security is to be owing to the bank by the chargor or the borrower (PBB) whether as principal or surety.

[38] The opposition to the claim made by the respondent in this case is simply this, namely by the term of the charge, only the amount due and owing by the borrower under the revolving credit facility could be claimed. The amount due and owing by the same borrower under the corporate guarantee should not be claimed pursuant to the charge. This would mean presumably that the respondent has to institute a separate claim pursuant to the corporate guarantee.

[39] It is found that the learned trial judge has not erred in allowing both claims to be made under an order for sale of land made pursuant to s 256 of the

National Land Code ('NLC'). The order for sale is preceded by an application and the court orders the sale of the land to which the charge relates unless there exist to the satisfaction of the court a cause to the contrary'. It is therefore, up to the person who opposes the application, that is the chargor, to establish whether there is a cause to the contrary. Order 83 of the RHC 1980 is the modality upon which a chargor seeks to enforce his rights. It is already trite as opined in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 that a chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. The chargee is enforcing his right by exercising a statutory remedy against a chargor in default. With respect to the words 'cause to the contrary', the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, stated the categories of cases in which 'cause to the contrary' might be established. These were:

(a) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC;

(b) when a chargor could demonstrate that a charge had failed to meet the conditions precedent for the making of an application for an order for sale. This means matters such as the one month notice, discrepancies in the amount of demand of principals and interests; or

(c) where the chargor could show that the grant of the order of sale would be contrary to any rule of law or equity.

[40] In so far as the amount is concerned, there is nothing uncertain or ambiguous about the amounts that are owing by the appellant as the result of the default of the borrower under the credit facility as well as the overdraft.

[41] The trial judge in the grounds of judgment had relied on cl 7 of the annexure to the charge where the term, inter alia, is that of a continuing security for all monies owing to the respondent by the borrower and/or the appellant whether as principal or surety. The appellant had adamantly maintained that it cannot be liable for the liability of Kia Peng Bhd (the borrower) for the corporate guarantee date 9 August 1994 just because it was made in favour of the respondent (Maybank) and persistently maintained that the appellant's liability is only restricted to the charge dated 9 December 1999 in favour of PBB. The appellant also maintained that to all intents and purposes the appellant was intending to redeem the charge. The appellant's contentions is simply grounded on the basis that a wrongful demand for payment has been made by the respondent as chargee whether under the charge or under statutory provisions. This in effect raises the question of whether the chargee is indeed prohibited in law or equity from claiming for the default under a credit facility as well the corporate guarantee. The reliance of the appellant of the principle annunciated of the case *Bunbury Foods Pty Ltd v National Bank of Australasia Ltd* (1984) 153 CLR 491 refers to the appellant

being allowed a reasonable opportunity to meet the demand before the creditor can enforce the security. This is rather irrelevant. Here, there is a contention that the appellant should be given more time to understand what is in demand and therefore whether in substance it does really constitute some sort of 'cause to the contrary'. The appellant relies on the argument that it would be contrary to the law of equity to make the appellant liable for the borrower's guarantee. However, the terms of the charge have never being disputed. The only issue is whether it is contrary to equity for the respondent to rely on the vesting order. The vesting order granted pursuant to s 50 of the BAFIA is also not disputed, whereby the right of PBB has been effectively transferred to the respondent and hence there has effectively resulted in an amalgamation of the rights of the respondent accruing from the charge created as well as the corporate guarantee. There is in effect a continuing security covering all monies at the time of the creation of the charge. The issue of the effect of BAFIA has been considered in *Phileoallied Bank (M) Bhd v Koshish Credit & Leasing Sdn Bhd* [2002] 1 MLJ 245; [2001] 4 CLJ 788. The learned judge Low Hop Bing J (now JCA) stated:

> The vesting order was made under s 50(1) of the BAFIA after the parties in the merger viz, the transferor and the transferee institutions viz Phileo Allied (M) Sdn Bhd and Malayan Banking Bhd have made a joint application to the Kuala Lumpur High Court by way of an ex parte originating summons. Section 50(3) of the BAFIA, which must be read in conjunction with s 50(1), is of critical importance to the determination of the preliminary objection and merits reproduction as follows:
>
> Where the order of the High Court under sub-s (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.
>
> Section 50(3) of the BAFIA expressly provides that the vesting order 'shall have effect according to its terms notwithstanding anything in any law or in any rule of law'. As these words are clear and unambiguous, it is the duty of the court to give effect to them as they are reflective of the intention of Parliament.
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> As learned counsel for the defendant relies heavily on the words of s 420(1), (2), (3) and (4) of the NLC, it is appropriate to reproduce them as follows:
>
> (1) Notwithstanding anything in any other written law, no order of the Court vesting any alienated land, or any share or interest therein, in any person or body shall affect the land, share or interest in question until it has been registered pursuant to this section.

A (2) The Court shall, accordingly, cause a copy of any order to be served on the Registrar or, as the case may be, (Land Administrator) forthwith after the making thereof; and the Registrar or (Land Administrator), upon receiving any such copy, shall give effect to the order by making a memorial of the vesting on the register document of title to the land to which, or a share or interest in which, the order relates.

B (3) The Registrar or (Land Administrator) shall sign and seal every memorial made by him pursuant to this section, and, if able to secure the production of the instrument in question, shall make a copy of the memorial on the issue document of title to the said land or, where the order relates to a lease or a charge, on the duplicate thereof.

C (4) Where the Registrar or (Land Administrator) takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

D Special emphasis was placed by defendant's learned counsel on the opening words 'Notwithstanding anything in any other written law' in s 420(1).

In my view, s 420(1), (2), (3) and (4) provide for the registration of vesting orders and the procedural steps which the registrar or the land administrator must take in order to effect such registration.

E However, the fact is that when NLC was enacted in 1965, BAFIA had not been brought into being yet. I am therefore of the view that Parliament could not have intended s 420 of the NLC to override the provisions of s 50(1) and (3) of the BAFIA which as stated above was never in existence then. The written law referred to in s 420(1) must be the written law in force at the time when s 420(1) was enacted and could not include eg, s 50(1) and (3) of the BAFIA.

F On the other hand, s 50(3) of the BAFIA provides that the vesting order 'shall have effect according to its terms notwithstanding anything in any law or in any rule of law, …'.

G Since s 420 of the NLC was already in existence at the time when s 50(3) of the BAFIA was enacted, it was obvious that the intention of Parliament is that the words 'shall have effect according to its terms notwithstanding anything in any law or in any rule of law' must mean that the vesting order shall take effect despite the provisions contained in s 420(1), as s 420(1) is clearly and unambiguously overridden by s 50(3). In other words s 50(3) of the BAFIA prevails over s 420(1) of the NLC. In any event, where there is an inconsistency between the provisions of two Acts of Parliament, as in s 420 of the NLC and s 50(1) and (3) of the BAFIA, the latter which was enacted some 24 years later, must prevail. In *Ramayah @ Ramasamy a/l Etican v Hussin bin Dahlan* [1993] MLJU 113, Richard Talalla J (as he then was) observed that since s 123 of the Legal Profession Act 1976 was enacted long after s 69(g) of the Subordinate Courts Act 1948, the provisions of s 123 of the Legal Profession Act 1976 must prevail if there was a conflict between them. In the circumstances, there can be no doubt in my mind that the terms of the vesting order by virtue of s 50(3) of the BAFIA would prevail over or supersede all laws including s 420(1) of the NLC.

H

I

I am mindful of a point of practice and procedure pertaining to a cause or matter eg, pending charge actions. As a general rule, where the rights under a charge have been vested into another party, (the successor party), that successor party must be substituted as plaintiff under O 15 r 7(2) of the Rules of the High Court 1980; and the relevant charge must be transferred and registered in the name of that other party pursuant to the NLC.

The said O 15 r 7(2) is reproduced as follows:

(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.

However, in the instant case, the vesting order is all encompassing and s 50(3) of the BAFIA allows these proceedings in a charge action to continue without the necessity of substituting Malayan Banking Bhd as the plaintiff or transferring and registering the registered charge in the name of Malayan Banking Bhd.

This is because s 50(3) of the BAFIA provides that the terms of the vesting order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, thereby prevailing over or superseding the provisions of both the Rules of the High Court 1980 and the NLC. Support for my view herein may be found in *Leong Moh Sawmill Co Sdn Bhd (in liquidation) v Standard Chartered Bank & Ors* [1996] 2 MLJ 614; [1997] 2 CLJ 131, where the question before the Court of Appeal was whether, in a change in the identity of the chargee, there is a need for the title of the action to be substituted to reflect the identy of the true chargee before the auction can be enforced. Briefly, in that case, the essential fact was that there was a similar vesting order under s 50(1) and (3) of the BAFIA in which the predecessor bank had transferred and vested all its banking business in a successor bank. Pursuant to an order for sale, an auction was carried out in the name of the predecessor bank. As in this case, the Court of Appeal was asked to decide on the legal implications of s 50(3) of the BAFIA and O 15 r 7(2) of the Rules of the High Court 1980. The Court of Appeal after referring to s 50(3) and O 15 r 7(2) held as follows:

Thus, by virtue of the vesting order, there has been a transmission of interest from one legal entity to another and under the provisions of O 15 r 7(2), there may be a substitution of the proper party to continue with the proceedings. However, by virtue of the qualifying words 'notwithstanding anything in any law or in any rule of law' appearing in s 50(3) of the Act, we consider that there is no necessity for a formal order under O 15 r 7(2) to regularise the position of the successor bank. (Emphasis added.)

[42] In addition, the approach expressed in *Re Tararone Investments Pte Ltd; Development Bank of Singapore Ltd v Ong Yew Huat & Ors (judicial managers of*

Tararone Investments Pte Ltd, jointly and severally) [2001] 4 SLR 167 per Chao Hick Tin JA, is relevant where he opined, inter alia, as follows in construing clauses which are similar to the one found in this appeal and he said as follows:

> 16. We shall now turn to consider the provisions in the charge. Under cl 1, the charge was expressly stated to be in respect of 'advances, loans credit and/or other banking facilities or accommodation' given to Sogo, all of which facilities are collectively referred to as 'the banking facilities'. Under that clause, Tararone covenanted to pay to DBS, on demand, all sums of money owing by Sogo in respect of those banking facilities. Clause 2 charged the FD with the repayment of all moneys owing by Sogo to DBS. Tararone further confirmed that the FD would be held by DBS as a continuing security for the due payment of all of Sogo's liabilities owing from time to time to DBS. Clause 3 authorised DBS, without notice to Tararone, to appropriate all or any part of the FD towards payment of all of Sogo's liabilities to DBS. Finally, cl 6 reaffirmed that notwithstanding the other provisions, the charge 'shall be and remain a continuing security for all moneys and liabilities from time to time owing by Sogo to DBS in respect of the banking facilities'. In the light of the terms of these clauses, there cannot be any doubt that this was an 'all money' charge.
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> 17. While it is true that the original reason for the creation of the charge was the $18m overdraft facility which DBS had then granted to Sogo, and which DBS were prepared to continue to extend to Sogo, the express terms of the charge clearly go beyond that. Nowhere is it stated, nor can it be implied, that the charge merely secures the payment of the overdraft facility. *The court ought to give effect to what the document expressly and specifically stated.*
>
> 18. In this connection reference may be made to *Bank of India v Trans Continental Commodity Merchants Ltd* [1983] 2 Lloyd's Rep 298 and *Re Rudd & Son* (1986) 2 BCC 98, 955. Admittedly, in these two English cases, the charging provisions were not identical to that of the present case and they also specified 'on any account whatsoever' or 'any other account', which are not to be found in our instant charge. However, in our opinion, these differences notwithstanding, they do not render the charge here any less an 'all-money' charge. While the words 'any other account' do not appear in the present charge, it must be borne in mind that cl 1 refers to 'advances, loans, credit and/or other banking facilities or accommodation'. It is a very wide clause. If the intention was merely to secure that specific overdraft account, it would have easily so stated. Furthermore, Tararone also covenanted to pay on demand 'all sums of moneys *which now or thereafter from time to time and at any time shall be owing' in respect* of the aforesaid banking facilities. This is again inconsistent with any intention to only repay the debt in the overdraft account.
>
> 19. In our judgment, the charge is truly a charge in respect of all moneys from any account which are owed by Sogo to DBS. We would reiterate that, if the overdraft account was all that the parties had in mind, they would have simply referred to that and would not have widened the clause to cover any 'advances, loans, credit and/or other banking facilities'. *Most of the clauses in the charge may well be standard provisions (as cl 4 is clearly not) but there is no canon of construction*

which allows the court to ignore the express words in a document, or to rewrite the terms which the parties have agreed, unless a plain construction of the words would lead to absurdity.

20. In this regard, it would be useful to examine the case of *Bank of India v Trans Continental Commodity Merchants Ltd* and glean the purposive and practical approach taken by the court in relation to a wide 'all money' clause in a guarantee given to a bank. There, the operative wording was 'in consideration of the (bank) … affording banking facilities' to the borrowers, the guarantors agreed to pay the bank 'all and every sum and sums of money which are now or shall at any time be owing to the bank anywhere on any account whatsoever'. In that case the claim related to losses suffered by the borrowers on some 12 foreign exchange contracts. The arguments advanced by the guarantors were that the foreign exchange transactions did not come within the terms 'banking facilities'. Both the English High Court and the Court of Appeal refused to let the wide terms of the guarantee be circumscribed by the opening words of the clause. At first instance, Bingham J said (*Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506 at p 512):

> I am, however, of opinion that the language of this guarantee was deliberately drawn in the widest possible language so as to cover any liability of the company to the bank arising out of their mutual relations as banker and customer, however that liability might arise and whether it arose out of what may be called a pure banking activity or not. I consider the language of the substantive clause so clear as to obviate the need for reference to the introductory recital, but even if regard is paid to that recital and 'banking facilities' were assumed not to include foreign exchange facilities I could not read the recital as cutting down in any way the deliberately wide language which follows. I would not, in any event, construe 'banking facilities' as excluding foreign exchange facilities offered by and through the bank. It is true that these are not what I have called pure banking activities. It is however indisputable that the major international banks conduct a large and regular business in foreign exchange dealing, which operations play a very large part in the business of some of them. It would, I think, be unrealistic in the modern financial world to treat facilities for the conduct of foreign exchange deals by and through banks as not being banking facilities, even though these are not facilities exclusively offered by banks.

21. This is view of Bingham J was affirmed by the Court of Appeal where Robert Goff J said ([1983] 2 Lloyd's Rep 298 at p 301):

> ... there is no ambiguity in the body of the guarantee justifying recourse to the introductory words to resolve any such ambiguity; but even if such recourse were justified, I would not myself read the words 'banking facilities' in those introductory words as excluding foreign exchange transactions of the type which were entered into in the present case. I am therefore unable to accept this argument.

22. In *Re Rudd & Son*, the issue was whether contingent liabilities were secured by the mortgage, which provided that 'all … sums … owing anywhere on the

current account of the firm (the borrower) or any other account … including' and naming various kinds of liability. The contingent liabilities were counter indemnities given by the firm to the bank in respect of performance bonds given by the bank to a local authority in connection with road works to be carried out by the firm. The liquidators of the mortgagor company argued that the contingent liabilities were not secured by the mortgage. It should be mentioned that, sometime after the liquidation of the mortgagor company, the local authority did call on the performance bonds. The Court of Appeal, reversing the High Court, took into account commercial sense in arriving at its decisions. Dillon LJ said (at p 98, 959):

> in my view it does not make commercial sense that the mortgage should cover contingent liabilities once they are called but not otherwise.

23. Nicholls J, the second member of the panel, said (at p 98, 961):

> In the proviso for redemption there are several references to transactions which at their inception would give rise to a contingent liability of the firm to the bank. I mention some of them. When a bill is discounted the liability of the firm to the bank will be contingent on the bill being dishonoured, which may not happen. Likewise, if the credit is made for the accommodation or at the request of the firm, the firm's liability to the bank in respect of this will be contingent until payment is made by the bank under the letter of credit. Again, liability of the firm to the bank as surety will normally be contingent on the primary debt accruing due as a present liability.
>
> To my mind it is abundantly clear that the security was intended to embrace these contingent liabilities. But that intention will not be given effect to if the proviso is read in such a way that only money which is shown as presently owing on a current or other account of the firm is covered by the security.
>
> For my part, I can see no justification for so reading the proviso. A common, if not strictly accurate, usage of the word 'including' by draftsmen is to refer to matters which are not embraced by the preceding words. So used, the word 'including' enlarges, or extends, as well as particularises. I think it is evident that the word 'including' is so used in this mortgage document.
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> So construed, the security created by this mortgage will extend to contingent liabilities, notwithstanding that the provision at the beginning of the proviso refers only to payment to the bank of 'all and every the sum and sums of money which shall for the time being be owing to the Bank by the Firm anywhere on the current account of the Firm or any other account.

24. *We have considered these two cases purely to gauge judicial attitudes in relation to such 'all money' clauses. We recognise that in each case, the relevant document must be considered as a whole in order to obtain its true sense. More significantly, the court has to interpret such clauses in accordance with its commercial sense, in order to give effect to the parties' intention.* (Emphasis added.)

[43] The appellant has also persisted in relying on a form of equity of redemption which doctrine was scrutinised in *Malayan United Finance Bhd v Tay Lay Soon* [1991] 1 MLJ 504 per Jemuri SCJ (as he then was): A

> This leads us to the question, what is this doctrine of equity of redemption? For the answer, we have to examine what a mortgage and the rule of equity of redemption thereof were in England before and after the passing of the English Law of Property Act 1925. Kekewich J in *Tarn v Turner* at p 453 explained with lucidity the concept of mortgage and equity of redemption in the following words: B
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> It is familiar to all of us that the law of mortgages, and more particularly, in respect of the redemption of mortgages, is founded in the first instance on the nature of a legal mortgage of freeholds — that is, upon its constitution as a conveyance of the property, with a proviso for its reconveyance in a certain event. Equity has long held that the real contract thereby created is not one of vendor and purchaser, but that it is a security for the repayment of the principal money and interest, and for the right to have the property back again in exchange for the money, if repaid at any time, although the time fixed by the covenant may long be past. The courts have construed *that right to have the property back as an estate in the land comprised in the conveyance; it is just as much an interest or estate as the fee-simple is, and has in legal phraseology become known as the equity of redemption*. (Emphasis added.) C D E
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> That was the position in respect mortgage prior to the Law of Property Act 1925. Since then, the legal mortgage underwent a slight change in its character and so did the nature of the equity of redemption. Under the present system of creating legal mortgages under that Act the mortgages takes only a term of years leaving the legal freehold reversion expectant on the mortgage term in the mortgagor. Thus the mortgagor retains his legal freehold estate and cannot at the same time have an equitable estate co-extensive with it. Hence, instead of his equity of redemption constituting an equitable estate or interest, it subsists only as a right in equity to redeem the property, this right being attached to his legal freehold estate. Nevertheless, despite the change, incident to every mortgage is the right of the mortgagor to redeem: *Halsbury's Laws of England*, (4th Ed) at pp 190 and 264. It must be borne in mind that Pearce v Morris is a case decided long before the Law of Property Act 1925 saw the light of day. With due respect quoting *Pearce v Morris* in *Eng Ah Mooi*'s case, Salleh Abas FJ was in fact applying the English concept of mortgage as explained by Kekewich J in *Tarn v Turner* with its incident of 'equity of redemption' into our Code where a charge is only a security for a loan without the necessity of the transfer of the estate or interest in the charged land. The equity of redemption and a discharge of a charge are poles apart. F G H
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> It certainly would avoid confusion if the term equity of redemption should not be used at all in dealing with a charge under the Code because in other jurisdictions, besides England, it conveys an entirely different idea. For instance, in New South Wales, Australia, it was used in a different sense altogether. In *Abigail v Lapin* at p 500 Lord Wright explained that the Real Property Act 1900, New South Wales, embodied the Torrens system of registration of title to land, not of deeds and of mortgages. He said at p 501: I

Provision is made by the Act for mortgages in statutory form, and for their registration; in such a case the legal estate remains in the registered proprietor of the fee simple, and the mortgage constitutes a charge of debt on the land; hence it may not be technically correct, though it is common, to speak of the mortgagor as having the equity of redemption, though the legal title remains in him. But a practice has sprung up of affecting what amounts to a mortgage by registering an instrument of transfer of the legal title from the mortgagor, and at the same time executing a document certifying that it was by way of security only. This is no doubt done for the purpose of facilitating dealings with the land by the transferee.

It thus can be appreciated that the equity of redemption as is known in England which is in the nature of a right bears no similarity in idea and effect with the equity of redemption in New South Wales, Australia, where a mortgage is closely analogous to a charge under our National Land Code, but in practice, coupled with a transfer of the legal title as well and where the equity of redemption is not a right but has grown out of practice. 'Equity of redemption' is a misnomer but persistence in its use is not a matter of law but of habit in Australia and in Malaysia it does not exist at all, either in the sense as understood in English law or in Australia, at least in New South Wales.

Under the National Land Code the interest in the land subject to a charge does not vest in the chargee but, upon registration of a charge, it renders the land subject to the charge liable as a security only in accordance with the provisions of the charge, express or implied (s 243). Under s 244(1), the chargee is entitled to the custody of the issue document of title so long the liability stays under the charge. There is no statutory provision for the discharge of the charge by the chargor but his right and that of a borrower to do so is embodied in the provisions of the charge itself. See cl 3(ii) of the annexure to the charge and s 249(1) of the National Land Code. However, under s 266(1) any chargor may at any time before the conclusion of a judicial sale of a charged land tender the amounts due to the Registrar of the court or the collector and the amount sufficient to cover all expenses in connection with the judicial sale. Since the right or interests in the charged land remains with the registered owner he has nothing to redeem. To speak of the equity of redemption or the like of it in our situation under the Land Code is clearly technically and legally incorrect. The term so used in relation to a charge is not only a misnomer but nonsensical. In our view the decision in *Eng Ah Mooi*'s case was made without the benefit of the Privy Council decision in the case of *Haji Abdul Rahman v Mohamed Hassan*. The relevant passage of the judgment is at p 216:

It seems to Their Lordships that the learned judges, in these observations, have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment. The very phrase 'equity of redemption' is quite inapplicable in the circumstances. There is no provision in the regulation for mortgages apart from what is described as a 'charge'; indeed, they are, except as regards those of the past, de facto abolished after the date of the enactment by s 4 already quoted. That provides for charges, which must be made in a statutory form and must appear on the register to be effective. Under such a system the right to the land remains with the registered owner. He has nothing to redeem, his right on paying the debt being to have the charge cleared off the register.

[44] Having regard to the above propositions of the law, it is found that the appellant has failed to raise a 'cause to the contrary'. The terms of the charge and the provisions of BAFIA clearly confer on the respondent a right to institute a mechanism pursuant to O 83 to claim both under the credit facility and the corporate guarantee. The court in this appeal has indeed to interpret what has been termed in *Re Tararone Investments Pte Ltd* as the 'all money' charge. Although the learned trial judge has made mention of certain clauses, it is found that she has not erred in the interpretation of the terms of the charge.

[45] The appeal is therefore dismissed.

Appeal allowed with costs.

Reported by Kohila Nesan